IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 12.06.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.352 of 2001

Sadasivam .. Appellant/Complainant

vs.

S.Rajamanickam
Proprietor
Sri Rathi Fibre Agencies
4/114-H,Sri Nagar
Jagirammapalayam and Post
Jagireddipatty Village,
Salem-2 .. Respondent/Accused

Prayer: This appeal has been preferred against the Judgment dated 20.09.2000, in C.C.No.57 of 1998 on the file of Judicial Magistrate NO.2, Salem acquitting the Respondent of the Charge from offence under Section 138 read with Section 142 of Negotiable Instrument Act, 1881 [as amended upto date] for the following amongst other.

For Appellant : Mr.S.Kalyanaraman

For Respondent : Mr.V.Manokar

JUDGMENT

This appeal has been preferred against the judgment in C.C.No.57 of 1998 on the file of the Judicial Magistrate No.2, Salem.

2. The appellant who had preferred a complaint against the accused under Section 138 of the Negotiable Instruments Act 1881(hereinafter referred to as "the Act') has lost his case before the trial Court has preferred this appeal.

3. According to the complainant, the accused had borrowed Rs.2,00,000/- under a promissory note on 3.11.1996 and issued a cheque for Rs.2,00,000/- on 28.1.1998 and when the cheque was presented before the Indian Overseas Bank, Suramangalam Branch, Salem, the same was returned with an endorsement that there is no sufficient funds in the

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account of the accused. On 2.2.1998, the complainant had issued a notice informing about the return of the cheque. After receiving the notice, the accused had sent a reply on 13.2.1998 but not chosen to repay the amount. hence the complainant had approached the Court under Section 138 of the Act.

4. The complaint was taken on file by the learned Judicial Magistrate, after taking cognizance of the same and after the accused appeared on summons, copies under Section 207 of Cr.P.C were furnished and when the offence was explained to the accused, he pleaded not guilty.

5. On the side of the complainant, P.Ws 1 to 3 were examined and Exs P1 to P8 were marked.

5. P.W.1 is the complainant who would narrate the averments stated in his complaint.

5a. P.W.2 is the Assistant Manager of Indian Overseas Bank, Suramangalam Branch wherein the complainant is having his account. According to him, Ex P1 is the cheque dated 28.1.1998 presented for collection and the said cheque was forwarded to the Central Bank of India, Agraharam Branch, Salem,wherein, the accused is having his account. The said cheque Ex P1 was returned by the Central Bank of India with Ex P3 memo stating that there is no sufficient fund in the account of the accused.

5b. P.W.3 is the Assistant Manager of Central Bank of India, Agraharam Branch, Salem who would admit that Current Account No.361 relates to the accused. He would further admit that Ex P1 cheque belongs to their bank which was given to the accused for his use. According to him, Ex P1 cheque was forwarded to his bank by the Indian Overseas Bank,Suramangalam Branch, for collection. But on the same day itself it was returned to Central Bank of India with an endorsement that there is no sufficient fund in the current account of the accused to honour the same.

6. When the incriminating circumstances were put to the accused, he denied his complicity with the crime. He has examined D.W1 and D.W.2 besides examining himself as D.W.3 and exhibited Exs D1 to D3.

7. After analysing both oral and documentary evidence meticulously, the learned trial Judge has come to a conclusion that the complainant has failed to prove the guilt against the accused under Section 138 of the Act and accordingly dismissed the complaint thereby acquitting the accused which necessitated the complainant to approach this Court by way of this appeal.

8. Now the point for determination in this appeal is whether the offence under Section 138 of the Act has been attracted against the accused to warrant conviction?

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9. Heard Mr.S.Kalyanaraman, learned counsel for the appellant and Mr.V.Manokar, learned counsel for the respondent and considered their rival submissions.

10.The Point:
This appeal has been preferred against the order of acquittal. Under such circumstances, the only point to be decided in this appeal is whether the findings of the learned trial Judge is perverse in nature to warrant interference from this Court.

10a. The case of the accused projected through D.Ws 1 to D.W.3 was accepted by the learned trial Judge and only on that basis the learned trial Judge has acquitted the accused from the charges levelled against him. But the learned trial Judge has failed to consider whether ExP1 cheque was handed over by the accused to the complainant and whether the said cheque on presentation in the bank was dishonoured to attract an offence under Section 138 of the Act. The defence taken by the accused is that one Jaganathan, the brother-in-law of the complainant is working as a Clerk in Indian Overseas Bank, Suramangalam Branch, Salem and that he had approached the said Jaganathan for a loan of Rs.2,00,000/- and along with his application , he had tendered his documents relating to his immovable properties along with a blank cheque which was manipulated and forged by the said Jaganathan in connivance with the complainant and produced by the complainant in this case as to appear though it was drawn in favour of the complainant by the accused. To substantiate this defence, the accused had examined D.Ws 1 and 2 besides examining himself as D.W.3.

10b. D.W.1 in his evidence would depose that the accused had handed over his documents along with a blank cheque in order to get loan from the bank and that he (D.W.1) himself had borrowed hand loan from the said Jaganathan and at that time, when he approached the said Jaganathan for loan, he has also signed 2 or 3 papers and even after the discharge of the loan, the said Jaganathan has not returned the said papers. He would say that the accused had no transaction with the complainant. But in the cross examination, he would depose that he has not seen the complainant Sadasivam before.

10c. D.W.2 would depose that he has also approached Jaganathan for loan and at that time, he had handed over his documents along with the blank cheque but he would depose that he has not borrowed any amount from the said Jaganathan. The reason being the said Jaganathan was arrested by the police by that time. But he would categorically depose that the accused also handed over the blank cheques and his documents to Jaganathan and borrowed loan whereas the defence of the accused is that he has not borrowed any loan from the said Jaganathan. Only for the purpose of getting loan, he has handed over the documents along with Ex P1 blank cheque. In order to discredit the demeanour of the complainant, the

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accused had produced Exs D3, the first information report registered by the Central Crime Branch, Salem against the complainant, Jaganathan and his wife. A perusal of Ex D3 would go to show that a criminal complaint was preferred by the Senior Regional Manager of Indian Overseas Bank, Suramangalam Branch, Salem, alleging that Jaganathan is an employee and the brother-in-law of Jaganathan viz., Sadasivam was having savings bank account in Indian Overseas Bank, Suramangalam Branch, Salem and had presented cheque No.146430 dated 19.11.1998 for Rs.2,00,000/- cheque No.146429 for Rs.2,00,000/- and another cheque for Rs.18,00,000/- and Cheque No.146432 for Rs.2,00,000/- drawn on Indian Overseas Bank, Suramangalam Branch, Salem to United Commercial Bank,Shevapet Branch, for collection and that he has misappropriated the said amount of Rs,.22,00,000/- and Rs.2,00,000/- respectively and the said amount was debited by Jaganathan fraudulently in the bank account. According to the complaint, both Sadasivam/complainant herein, his brother-in-law Jaganathan and his wife Pushpammal hatched a conspiracy to cheat and defraud Indian Overseas Bank to the tune of Rs.24,00,000/- and dishonestly misappropriated the said amount during the period 1997 to March 1999.

10d. Relying on the above said complaint, Ex D3, the learned counsel appearing for the accused/respondent herein would contend that one such cheque handed over to Jaganathan for obtaining a loan from the Indian Overseas Bank, was stolen away from the bank by the said Jaganathan , the brother-in-law of the complainant herein and forged as to appear that it was drawn by the accused in favour of the complainant Sadasivam, and on the basis of the said forged cheque Ex P1, the complaint has been preferred by the complainant. If the case of the accused is true, then in Ex D3 complaint, Ex P1 cheque number has also been mentioned by the complainant to the effect that the cheque presented in the Indian Overseas Bank was stolen away by the said Jaganathan.But absolutely there is no evidence on record to show that Ex P1 cheque was handed over to Jaganathan by the accused for the purpose of getting loan from the Indian Overseas Bank. If the accused required any loan, then the natural conduct expected from him is to approach the Manager of the said Bank and not a clerk of the bank. The learned counsel appearing for the accused/respondent would contend that since Jaganathan was in charge of the loan Section, the accused has approached him. To prove that Jaganathan was in charge of the loan Section in Indian Overseas Bank, Suramangalam Branch, there is absolutely no evidence let in on the side of the accused. Except, the oral evidence of D.W1 and D.W.2, there is no documentary evidence on record to show that they have also approached Indian Overseas Bank, Suramangalam Branch for a loan through Jaganathan and that they have been sanctioned the loan. There is absolutely no evidence on record to show that the accused has preferred any complaint against the said Jaganathan either with the higher officials of the Indian Overseas bank or with the police to the effect that he had cheated him after receiving a cheque for Rs.2,00,000/- for the purpose of sanctioning of the loan.

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10e. On the other hand, P.W.1 has narrated the averments stated in the complaint to the effect that the accused had borrowed a loan of Rs.2,00,000/- but he failed to repay the same and on his demand, he had drawn Ex P1 cheque on 28.1.1998 for Rs.2,00,000/- in his favour. In this context, the accused has not disputed his signature in Ex P1 cheque. Under such circumstances, presumption under Section 139 of the Act against the accused is that the holder of the cheque, received the cheque for the discharge in whole or in part or any debt or other liability. At this juncture, the learned counsel appearing for the accused/respondent would contend that as per the Explanation to Section 138 of the Act , it is the duty of the complainant to prove that only to discharge the legally enforceable debt or other liability, Ex P1 cheque was drawn by the accused and that in this case, it is the case of the complainant that only under the promissory note of the year 1996, the accused had borrowed a sum of Rs.2,00,000/- from him but the said promissory note has not seen the light of the day. But we should not forget the fact that this case has been filed under Section 138 of the Act and not under any promissory note. Once the complainant has presented the cheque and proved that on presentation of the cheque with the bank, the same was dishonoured , then automatically the presumption under Section 139 of the Act will follow to the effect that only to discharge a subsisting liability , the cheque was drawn by the drawer of the cheque in favour of the payee . No doubt, under Section 139 of the Act, the presumption is rebuttable one. But in this case, the accused in his attempt to rebut the evidence of P,.W.1 has miserably failed to show that Ex P1 cheque was handed over to his brother-in-law Jaganathan and was manipulated and forged by the accused and produced in this case.

11. Under such circumstances, I am of the view that the findings of the learned Judicial Magistrate No.2, Salem in C.C.No.57 of 1998 is not based on the materials available on record,but only carried away by the evidence of D.Ws 1 to 3 which are not supported by any documentary evidence to show that Ex P1 cheque was handed over to Jaganathan by the accused. Under such circumstances, I hold that the accused is guilty under Section 138 of the Act and accordingly this Court convict the accused.

12. When coming to the question of sentence, following the principle laid down by the Honourable Apex Court in Goa Plast(P) Ltd.,-v- Chico Ursula D'Souza(2004)2 Supreme Court Cases 235) wherein it has been observed as follows:

> "Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to

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ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment, it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in Modi Cements Ltd.v.Kuchil Kumar Nandi(1998)3 SCC 249). . . . Reliance was also placed on paragraph 17 of the Judgement of this Court in the case of M.M.T.C. Ltd.v. Medchl Chemicals and Pharma(P) Ltd. Which reads as under:(SCC P.240,para 17) " There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability. . . . . We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138, as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both,. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act. The

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> object and ingredients under the provisions, in particular, sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of the issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious set back. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil Court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.

After the above said observation, the Honourable Apex Court has held that the accused is liable to pay a sum of Rs.80,000/-(twice the amount of the cheque) by way of demand draft to the complainant with default sentence, I am of the view that the same yardstick will squarely applicable to the present facts of the case.

13. Following the principle enunciated in the above said dictum,I am of the view that instead of giving any sentence, the accused can be directed to pay twice the amount of the cheque ito the complainant n this case also. The point is answered accordingly.

14. In the result,the appeal is allowed and the Judgment in C.C.No.57 of 1998 on the file of Judicial Magistrate No.2, Salem is hereby set aside. The accused is convicted under Section 138 of the Act and one month's time from the date of receipt of a copy of this order is given to the respondent/accused herein to pay a sum of Rs.4,00,000/-(Rupees Four Lakhs) only (Twice the amount of the Cheque) to the appellant/complainant. In default, thereof, the respondent/accused shall suffer simple imprisonment for six months.

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14. In the above lines, the appeal is disposed of.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

sg

To,
1.The Judicial Magistrate No.2, Salem.

2.-do- the Chief Judicial Magistrate, Salem

+ 1 CC To Mr. S.Jayaselan, Advocate SR NO.34366

+ 1 CC To Mr.V.Srinivasan, Advocate SR NO.34169

Crl.A.No.352 of 2001

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